

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ARCIDES D. PERAZA
Claimant

VS.

SCHELLERS, INC.
Respondent

AND

CINCINNATI INDEMNITY COMPANY
Insurance Carrier

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Docket No. 1,031,322

ORDER

Respondent appeals the December 10, 2007 preliminary hearing Order For Compensation of Administrative Law Judge Brad E. Avery. Claimant was awarded temporary total disability (TTD) benefits beginning August 16, 2007, until further order, or until certified as having reached maximum medical improvement, or until released to a regular job, or until returned to gainful employment, whichever comes first. In addition, claimant was awarded medical treatment with Robert L. Satake, M.D., "for nerve conduction-EMG study until further order or until certified as having reached maximum medical improvement."¹ Claimant was awarded these TTD and medical benefits after the Administrative Law Judge (ALJ) determined that claimant suffered an accidental injury that arose out of and in the course of his employment with respondent.

Claimant appeared by his attorney, Robert R. Lee of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Christopher J. McCurdy of Overland Park, Kansas.

The Appeals Board (Board) adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held October 31, 2006, with attachments; the transcript of Preliminary Hearing held December 7, 2007, with attachments; and the documents filed of record in this matter.

¹ Order For Compensation at 1.

ISSUES

In its Application For Review, respondent raised the issue of whether claimant sustained a personal injury by accident arising out of and in the course of his employment. In respondent's brief to the Board, respondent also raised the issue of notice.² At the December 7, 2007 preliminary hearing, the ALJ confirmed that respondent admitted notice.³ At the first preliminary hearing, respondent admitted compensability of the accident to the head, but denied compensability for the low back or the blood pressure problem.⁴

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant, a Spanish-speaking individual, suffered injury on August 8, 2006, while performing landscape work for respondent. On August 8, claimant was tilling dirt and picking up stones. It appears that claimant was working near a set of stairs that had a metal handrail. He bent down to pick up stones, and when he rose up, he hit his head on the handrail and then he fell on his back. When he stood up, he felt dizzy.

Claimant alleges that as a result of this accident, he is having headaches. He also testified about an injury to his right eye, and is alleging hypertension as a result of the accident. Claimant also describes pain to his low back which he did not know about until two months after his injury. Claimant testified that the reason he did not know about the back pain until two months after the injury was because he was in bed for most of that time and it was not until he started moving around that he started feeling the pain in his back.⁵

After the injury, claimant reported the accident to his supervisor, but he did not seek immediate medical treatment. Claimant reported the injury, but he did not know how to explain it. He said that he hit his head. Nobody claimant worked with spoke Spanish.

² See Respondent's Brief at 2-3.

³ P.H. Trans. (Dec. 7, 2007) at 6 and 47.

⁴ P.H. Trans. (Oct. 31, 2006) at 4.

⁵ Claimant did not initially make complaints about back pain. (P.H. Trans. (Oct. 31, 2006) at 14.) It was on October 11, 2006, when claimant told the doctor about his lower back pain. (P.H. Trans. (Oct. 31, 2006) at 15.)

Claimant testified that he told his employer that he was having terrible headaches and “I ask him if I can go inside the building, so I can have, you know, sit and get different airs.”⁶

Claimant sought treatment at Flint Hills Community Health Center (Flint Hills) on August 15, 2006. According the medical records, claimant complained at that time of right eye pain of six days duration.

On August 19, 2006, claimant was seen at the emergency room at the Newman Regional Health Center in Emporia where he came under the care of Dr. Rahul P. Singh. Claimant complained of a headache on the right side of his head of 10 days duration. The medical records indicate claimant “does not remember any precipitating event.” Claimant was diagnosed with a subdural hematoma. Dr. Singh referred claimant to John R. Dickerson, M.D., a neurosurgeon in Wichita.

On August 21, 2006, claimant returned to Flint Hills for follow up from the emergency room. According to the August 21 medical record from Flint Hills, claimant was told to go to Wichita that same day and see Dr. Dickerson.

Claimant went to Wichita and saw Dr. Dickerson at the Via Christi Regional Medical Center on August 21, 2006. Claimant gave a history of bumping his head on an iron pole and complained of a headache with nausea and dizziness. Claimant was diagnosed with a right traumatic parietal subdural hematoma.

On August 23, 2006, Dr. Dickerson performed surgery on claimant’s head to reduce swelling. After the surgery, Dr. Dickerson talked to claimant about his high blood pressure. Claimant testified that Dr. Dickerson told him that he was having those problems because of the injury. Claimant had never had or been treated for blood pressure problems before the injury.⁷ Dr. Dickerson told him that since claimant did not have high blood pressure problems before the injury, that he needed to see a doctor because now he was having this problem. According to claimant, the high blood pressure has caused him to have headaches. But, it was only after the accident that claimant developed high blood pressure.

Claimant’s primary symptom after the injury was a headache, with constant pain. In addition to having headaches, after the accident, claimant started having pain in his lower back and left leg which he did not have before. He is also having problems in his ear, his eye and his foot.

⁶ P.H. Trans. (Dec. 7, 2007) at 11.

⁷ The medical records from Newman Regional Health Center indicate that claimant reported to the personnel at the hospital that he had his blood pressure checked at the grocery store and that it was always high. (P.H. Trans. (Dec. 7, 2007) at 23-24 and Resp. Ex. A; see also Respondent’s Brief at 4.)

Claimant notified his supervisor of the accident on the day that it happened. He told the shop manager about it the next day. However, claimant does not speak English and he did not know how to explain it because there was no one to interpret for him as nobody spoke Spanish. He thinks they understood that his head was hurting.⁸

Claimant was seen at Flint Hills for his high blood pressure. In a letter dated February 12, 2007, Lynn Bridge, ARNP, of Flint Hills would not relate the high blood pressure to the injury.⁹

On October 11, 2006, claimant again saw Dr. Dickerson. On that day, Dr. Dickerson ordered a CT scan of claimant's head. He also ordered an MRI of claimant's lower back, but the MRI was not approved. The problems claimant is having with his lower back are that "especially when I'm walking I feel pain from my knees down, and when I touch my lower back I feel like a little bump on it and it hurts."¹⁰ He has never had these problems before.

Claimant saw Paul S. Stein, M.D., on February 8, 2007, at the request of respondent's medical rehabilitation consultant Leslie M. Price. Claimant reported to Dr. Stein that he struck his head on a handrail.

On May 21, 2007, claimant saw Patrick Caffrey, Ph.D., a psychologist. Dr. Caffrey recommended that claimant have pain management for his headaches, and for his right leg pain, left leg pain and low back pain.

On July 24, 2007, claimant saw Robert L. Satake, M.D., who performed an MRI scan of claimant's brain and lower back. Dr. Satake also recommended nerve conduction studies on his legs, but those were never authorized by the workers compensation carrier and, thus, were not done.¹¹

Claimant saw Vito J. Carabetta, M.D., on April 2, 2007, for an independent medical evaluation (IME). Claimant reported to Dr. Carabetta that he struck the right side of his head quite forcefully on a metal railing. He saw Dr. Carabetta for the last time on September 12, 2007, and Dr. Carabetta placed permanent restrictions on claimant's activity at the request of respondent.

Claimant has not worked anywhere since September 12, 2007.

⁸ P.H. Trans. (Oct. 31, 2006) at 16.

⁹ See PH. Trans. (Dec. 7, 2007), Cl. Ex. 1.

¹⁰ P.H. Trans. (Oct. 31, 2006) at 10.

¹¹ P.H. Trans. (Dec. 7, 2007) at 15-16 and Cl. Ex. 1 (Dr. Satake's report of August 15, 2007).

Claimant saw Pedro A. Murati, M.D., on September 19, 2007, for an IME at the request of claimant's attorney. On September 19, 2007, claimant reported to Dr. Murati that he bumped his head on an iron handrail while working for respondent. Claimant indicated to Dr. Murati that he had neck pain. The only doctor that claimant reported the neck pain to was Dr. Murati.

Mike Scheller, respondent owner, testified at the December 7, 2007 preliminary hearing that he is not saying that claimant did not hit his head on a handrail. He knew that claimant had surgery to drain a subdural hematoma.

James Kahle, respondent's maintenance supervisor, testified at the December 7 preliminary hearing. Mr. Kahle does recall while he was working with claimant that claimant complained of headaches before the date of his August 8, 2006 accident, but he does not recall the specific dates. Later in his testimony, Mr. Kahle stated that it was sometime before August 23, 2006, that claimant complained of having headaches.

Larry Drum, a supervisor with respondent, testified at the December 7 preliminary hearing that sometime after August 8, 2006, claimant came to him complaining of headaches. Mr. Drum suggested that claimant go see a doctor. At that time, claimant did not say anything about hitting his head at work.

When Mr. Drum was asked if he was able to communicate with claimant, Mr. Drum testified, "We done pretty well on it." And if there were any problems, "I generally went through the daughter."¹²

Mr. Drum first found out that claimant was alleging that his headaches were caused by a work-related injury when claimant's daughter called and talked to him about her father's condition. She told Mr. Drum that claimant was "bad" and that she did not know what to do. Mr. Drum suggested claimant see a doctor.¹³ Mr. Drum testified that he talked to claimant's daughter on two occasions on that same day by telephone.¹⁴ Those conversations were on or about August 21, 2006.¹⁵ The first conversation with claimant's daughter occurred before claimant was seen at Flint Hills.¹⁶

¹² P.H. Trans. (Dec. 7, 2007) at 41.

¹³ *Id.* at 42.

¹⁴ Claimant's Brief at 3.

¹⁵ Respondent's Brief at 4.

¹⁶ *Id.* at 4.

Later that same day, claimant's daughter called again and told Mr. Drum that claimant was being sent to a doctor in Wichita. Mr. Drum thinks that it was at the time of that second conversation that claimant's daughter told him that claimant had hit his head at work. He acknowledged that that was the first time he was aware claimant's headaches were due to an injury at work.

Mr. Drum testified that he did not see how claimant could have hit his head on the handrail unless he stumbled. Regarding the accident, Mr. Drum did not see anything. He was not working with claimant on the day that the accident occurred.

Mr. Drum acknowledged that he indicated that when claimant told him about the headaches, claimant did not say that he had hurt himself on the job. However, Mr. Drum also admitted that he does not speak Spanish.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹⁷

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.¹⁸

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.¹⁹

The ALJ determined that claimant had suffered an accidental injury which arose out of and in the course of his employment with respondent. For preliminary hearing purposes, this Board Member agrees. Claimant's explanation is credible as to how he hit his head. Additionally, the pictures²⁰ of the hand rail display both low and high rails where claimant could have struck his head while working. The fact claimant did not immediately describe the method of injury can be attributed to his language barrier. No one with respondent is able to speak Spanish, and Mr. Drum acknowledged that when there was a problem

¹⁷ K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

¹⁸ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

¹⁹ K.S.A. 2006 Supp. 44-501(a).

²⁰ P.H. Trans. (Dec. 7, 2007), Resp. Ex. B.

communicating, he was forced to use claimant's daughter as an interpreter. Claimant and respondent, in their briefs, argue regarding multiple physical ailments and their relationship to the injury on August 8, 2006. However, the Order of the ALJ is not as all-encompassing as the parties assume. The Order allows claimant TTD and medical treatment with Dr. Satake. But the Order allows Dr. Satake to order nerve conduction-EMG studies only. No other medical treatment is ordered. Additionally, Dr. Satake in his report of August 15, 2007, ruled out the possible old lacunar infarct on the right (discovered during the MRI done on claimant's brain) and claimant's hypertension as being connected with the alleged injury. In fact, he strongly recommended claimant see Lynn Bridge, ARNP, claimant's primary care provider, for those conditions. Ms. Bridge, in her letter of February 12, 2007, was unable to determine a connection between claimant's head trauma and the blood pressure problems.

The MRI of the lumbar spine showed only minimal lumbar spondylosis. EMG/NCTs of the lower extremities are in line with the recommendations of Dr. Stein, who examined claimant on February 8, 2007, at the request of respondent's medical rehabilitation consultant Leslie M. Price. Dr. Stein recommended the EMG/NCT studies as further investigation as to the symptoms and cause of the lower extremity complaints. Dr. Satake appears to intend to use the EMG studies as a basis for further recommendations for the cause and treatment of claimant's lower extremity symptoms.

Based upon the evidence in this record, this Board Member finds the Order of the ALJ should be affirmed. The authorization for Dr. Satake to perform the nerve conduction-EMG study is a recommendation for a test of causation determination, not a definite determination regarding whether there is a connection between the lower extremities and claimant's injury. Additionally, based on the reports of Dr. Satake, there is no connection between claimant's accident and either the lacunar infarct or the hypertension. The Order granting Dr. Satake the authority to proceed with the nerve conduction-EMGs should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.²¹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has proven that he suffered an accidental injury on August 8, 2006, which arose out of and in the course of his employment for respondent. The Order of the ALJ

²¹ K.S.A. 44-534a.

granting Dr. Satake the authority to proceed with the nerve conduction-EMG tests is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order For Compensation of Administrative Law Judge Brad E. Avery dated December 10, 2007, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March, 2008.

HONORABLE GARY M. KORTE

c: Robert R. Lee, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge